IN THE MATTER OF ARBITRATION BETWEEN

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Supervalu, Inc.,

Employer,

DECISION AND AWARD

and

BMS CASE NO. 06-RA-1240

International Brotherhood of
Teamsters, Local 120,

Union.
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ARBITRATOR:	Stephen A. Bard
DATE OF HEARING:	February 8, 2007
PLACE OF HEARING:	Minneapolis, Minnesota
DATE OF MAILING OF POST-HEARING BRIEFS:	April 6, 2007
DATE OF DECISION AND AWARD:	May 21, 2007
GRIEVANT:	Kristopher Johnson

APPEARANCES:

For the Employer:

Mr. Jonathan O. Levine
Michael Best & Friedrich LLP
100 East Wisconsin Avenue, Suite 3300
Milwaukee, Wisconsin 53202-4108

For the Union:

Mr. Russell Platzek
Hughes & Costello
1230 Landmark Towers
345 St. Peter Street
St. Paul, Minnesota 55102-1216

INTRODUCTION

This matter came on for arbitration before neutral Arbitrator Stephen A. Bard, on February 8, 2007, at 9:00 a.m. in Minneapolis, Minnesota. The Employer was present with its witnesses and was represented by Mr. Jonathan Levine. The Union was present with its witnesses and was represented by Mr. Russell Platzek.

The parties stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the Arbitrator for a decision on the merits. Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on March 23, 2007. This date was subsequently extended by agreement of the parties to April 6, 2007.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it terminated the employment of the Grievant?

2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE 7
VACATIONS

7.15 Employees with two (2) or more weeks of vacation will be permitted to split one (1) week of vacation into single day increments. One additional week of vacation allotment will be permitted on each shift solely for the purpose of employees taking vacation in single days. The Employer agrees that split vacation days may be used to fill open slots on the weekly vacation board not already bid.

ARTICLE 8
HOLIDAYS

8.02 …….To qualify for all holidays, said employees must work on their regularly scheduled work day before and their regularly scheduled workday after the holiday.

8.05 When mutually agreed upon between the employee and the Employer, the employee may be permitted to work on a personal holiday; i.e., the employee's birthday and his anniversary date of employment, for which he shall receive straight-time pay plus holiday pay.

ARTICLE 13
DISCHARGE

13.01 Drunkenness, dishonesty….violations of Employer's rules which are not in conflict with this Agreement…shall be grounds for immediate discharge.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. Supervalu is a distributor of groceries to retail food stores. The Hopkins, Minnesota distribution center employs approximately 900 to one thousand warehouse employees as forklift drivers, loaders, and order selectors on a 24/7 schedule. The workers are represented by Teamsters Local 120.
2. The Grievant was hired as an order selector in December of 2002. Between the date of his hire and June 12, 2005, the Grievant committed a number of violations of the attendance policies that existed at that time. Many of the unauthorized absences occurred adjacent to weekends or holidays. He received several forms of discipline including verbal and written warnings up to and including a "final warning."

3. In June 2005 the company faced what it viewed as a serious attendance problem at this facility and adopted a revised attendance policy to attempt to remedy the problem. After consulting with the Union, a new attendance program was adopted effective June 12, 2005 and was communicated to the employees, including the Grievant, in writing and in explanatory meetings.
4. The new attendance policy lists 12 categories of excused absences including but not limited to absences that are covered by the Family Medical Leave ACT ("FMLA"), absences caused by work-related injuries, and all paid and unpaid time off that is either permitted or required by the Collective Bargaining Agreement. Unexcused absences are referred to as "occurrences." All other absences, no matter what the cause, are considered unexcused and are counted towards progressive discipline over a rolling 11 month period.

   Under the policy, there is a consultation after 3 occurrences, a verbal warning after 5 occurrences, a written warning after 7 occurrences, a "final warning" after nine occurrences, and at 11 or more occurrences there is termination of employment at the discretion of the employer.
5. When the new policy was adopted in June of 2005, employees were sent a letter advising them of their status under the new policy. At that time the Grievant had already exceeded the number of allowed occurrences. However, he was given a written notice constituting a "last-chance final warning" which he received on or about June 6, 2005.
6. The Grievant was absent from work because of illness beginning September 6, 2005. His symptoms were fatigue and sore throat. He first saw a doctor on September 12. He tested negative for strep throat. He was diagnosed with bronchitis and pharyngitis. He was

initially told he could return to work on September 13 but he did not do so. He returned to the doctor on September 22 complaining of the same symptoms. He tested negative for mononucleosis, and pneumonia. He was given a prescription for a new antibiotic and told to rest and drink a lot of fluids. He returned to work without medical restrictions on September 26, 2007.

7. In October 2005 there were "Step 4" hearings in grievance procedures involving four other employees who claimed to have been adversely and prejudicially affected by the implementation of the new attendance policy in June. As a result of those proceedings the Step 4 panel issued a unanimous opinion returning the discharged employees to work with an unpaid suspension and placed them at the "final warning" stage under the new policy. Those employees who had exceeded 11 absences but had not been discharged were placed back at nine occurrences. The Grievant fell into this group and in October was placed back at the "final warning" stage at 9 occurrences.

8. When the Grievant was presented with his final warning pursuant to the Step 4 panel decision, he claimed to his supervisor that his September absences should not count as occurrences because they qualified as FMLA leave and therefore should be excused absences. The Grievant was then allowed to present medical evidence from his doctor "after the fact" that his absences between September 6 and September 25 did indeed qualify as serious illnesses entitling him to FMLA leave. Accordingly, the company removed these absences from his record as "unexcused" in November. The result of this was that the Grievant's status reverted to three occurrences.

9. The Grievant was then absent without an excuse on November 23, the day before Thanksgiving, November 25, the day after Thanksgiving, and also November 26, 27, and 28. He was scheduled to work all of those days. This brought him to eight unexcused absences. A consultation took place on December 2. The Grievant was absent without excuse again on December 4 and December 16 putting him at ten unexcused absences. A verbal warning was given at a meeting on December 19 between the Grievant and his supervisor. At the meeting the Grievant indicated that he did not have any issues that were preventing him from coming to work and committed to improving his attendance. He did not mention reasons for his absences or request FMLA leave for them.
10. The Grievant missed work to attend a deposition in Fargo on December 23. Because he had evidence that he was in Court he was given an excused absence under the policy. He also missed work on December 24 which is a very busy day for the company. His reason for being gone was that he couldn't get back in time from Fargo. The Grievant spent Christmas Eve and Christmas Day with his family in Fargo and returned to work on December 26, 2005. This was not an excuse under the policy and he was given another unexcused absence, bringing him to a total of 12 with 9 in the two months since he had been "reset" to three occurrences in October. The Grievant was given a written warning. A meeting took place between the Grievant and Mr. Erickson and Ms. Diane Bauer to review the warning. Again, the Grievant admitted knowing how many days he had missed, said there were no issues preventing him from coming to work, committed to improve his attendance, and did not claim any FMLA leave.

11. The Grievant was next absent on Saturday, December 30 and on January 3, 2006 was given a final warning because of the December 30 absence. In a meeting over this final warning the Grievant claimed for the first time that the company, in imposing this discipline, was violating a company policy requiring two occurrences between disciplinary steps. He also claimed at this meeting for the first time that the absences around Thanksgiving were a result of a recurrence of his September illness and should qualify him for FMLA excused leave. However, he did not present any medical evidence or other paperwork supporting the claim and the company refused to reconsider.
12. On January 4, 2006, the Grievant filed a grievance challenging the Final Warning. The sole basis for that grievance was a claim that the revised attendance policy required two (2) occurrences (i.e., unexcused absences) between steps of discipline. The Company denied the grievance stating that two occurrences between steps were not required by the revised attendance policy.
13. On the late evening of Sunday, April 2, 2006, the Grievant received a call from his mother informing him that his grandmother had a stroke. The Grievant called an attendance hotline used by the Company and left a message that he would not be into work the following day due to a family emergency. The Grievant also called Bill Moore and left a message that he would like to take split-day vacation or personal holidays on April 3rd and 4th, 2005. The Grievant did not request time off for April 5th and 6th because those were his normal days off.
14. The Grievant went to Fargo without actually talking to Moore and he did not return to work until Friday, April, 7, 2005. On April 7th, the Grievant met with Moore, who granted his

request for a split-day vacation for April 4th but not April 3rd. Moore denied the Grievant's request for time-off on April 3rd because the Grievant did not make the request 24-hours in advance of his scheduled shift. The Grievant was also denied a "personal day" on the grounds that under Section 8 of the parties' agreement, personal days can only be used on the employee's birthday or anniversary date.

15. The following day – Saturday, April 8, 2006 – the Grievant missed work claiming that he had a cold. The Grievant did not call or see a doctor.

16. Because the Grievant had now accumulated 12.5 unexcused absences in less than 6-months, the Grievant's records were given to Susie Hansmann for review. Hansmann reviewed the records in order to ensure that all steps of discipline had been followed, that the Company was in compliance with the FMLA, and that a terminal or mental illness was not at issue. Based on this review, Hansmann concluded that the Grievant's employment should be terminated. Bill Moore met with the Grievant to communicate the decision on April 11, 2006. This grievance followed.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. <u>The Employer Must Show Just Cause for Discipline</u>. In this case, the standard of review for disciplinary actions is "just cause," by the parties' agreement, past practice, and prior decisions. The parties have previously and repeatedly agreed that just cause is required under the terms of this CBA. It is the majority rule to infer such a standard when, as here, it is unaddressed in the parties' agreement.

2. The Employer Did Not Have Just Cause to Terminate the Grievant.

(a) The attendance policy is not a substitute for just cause.

"Just Cause" is a concept requiring individualized application to the particular circumstances of each and every grievant's case. A determination as to whether just cause is present calls for an appraisal of the substantiality of the reasons for the action taken and a judgment on whether the discharge penalty is fair and reasonable under all the circumstances and not disproportioned to the offense. In this case SuperValu's attendance policy is not determinative but is subservient to the CBA, and the application of the just cause principle requires an individualized examination of the particular circumstances under which Grievant accumulated the points resulting in his firing. . The Union does not maintain that a certain number of points to trigger discipline, in and of itself, is unreasonable. But the Union rejects the notion that just cause can be thus quantified into an 11-point, no-fault policy. SuperValu's attendance policy is just a guideline—a quantitative system of monitoring attendance under normal circumstances. It is not an automatic calculator that substitutes for just cause analysis.

(b) SuperValu did not apply its attendance policy reasonably to the Grievant.

In this case, the Employer's exercise of discipline under the attendance policy was unreasonable, based on the particularized facts of the grievant's incidents.

One-and-one-half points incurred by Johnson were due to tardiness. Of these, one point was appropriately imposed, as the Grievant overslept. The half-point was for a very minimal incident—the Grievant was eight minutes late for work. One point was incurred because he had to respond to a family emergency, and his Supervisor would not grant him the day off

without penalty. One point was incurred because he was dealing with the legal consequences of his brother's death. He had to attend a deposition related to his brother's death, and was relying on his parents to drive him back from Fargo to the Twin Cities. Because the deposition ran late into the day, because of the emotionally taxing memories raised in the deposition, and because his parents had to work early the next day, He had to accept his parents' inability to drive him home, and take an additional day. The Grievant followed all requirements to give notice to his employer, and believed the day would be excused, as he had been told by his Supervisor that absences due to legal obligations would be excused. It was only after he returned to work that he learned the second day would not be excused.

The remaining nine points incurred by the Grievant were for illnesses; six of those for one continuous stretch of illness. This period of illness could have qualified for FMLA leave; however, he was not properly advised of his eligibility and the opportunity to provide the necessary documentation was lost. These facts do not reveal an employee who held his attendance obligations in disregard. Rather, the Grievant was a good employee who experienced a series of challenges that unavoidably pulled him from his workplace. He could not control becoming sick; could not control the circumstances of the Fargo deposition; and could not control his grandmother's stroke. At most, he was personally culpable for the one-and-one-half points incurred for tardiness.

3. The Employer improperly terminated Grievant for an FMLA-covered incident occurring in November-December 2005.

Grievant's bronchitis and subsequent recovery therefrom constituted a serious illness for which he was entitled to excused absences—that is, absences that could not count as

occurrences. The Grievant's absences during November and early December, 2005, should have been covered under FMLA because he had a serious health condition as defined by law. A "serious health condition" is defined in the law as an "illness, injury, impairment, or physical or mental condition" that involves a "period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days."

The Grievant experienced a long period of illness in September, 2005, which was initially deemed a period of absence subject to discipline by the Employer. However, because the absence was based on illness, the Employer finally approved the September absence as FMLA absence not subject to discipline. The six days of absence in November and early December, 2005, were due to a relapse of the same illness, and the Grievant used the same medication to treat the illness. Unfortunately, he did not see a doctor during that shorter period of illness, and was never advised to do so to qualify for FMLA leave. The Employer has conceded that Grievant's bronchitis constituted a serious health condition for purposes of the FMLA, and that he was entitled to FMLA leave, by granting the leave for September. Had the Grievant been properly advised of his rights under FMLA, he could have obtained appropriate documentation to authorize FMLA leave, and avoid the six imposed points. Because Grievant was entitled to FMLA leave for the six missed days in November-December 2005, the Employer was required to provide him with that leave. It is not the employee's responsibility to inform the employer that he intends to exercise his or her rights under the FMLA. The burden is on the Employer to recognize circumstances in which FMLA may be invoked, and actively investigate to determine whether the employee is

entitled to benefits under this provision.

The Employer failed in this duty. The unrebutted evidence is that Grievant applied for FMLA leave by providing SuperValu with notice that he would miss work for bronchitis and that he was entitled to that leave. This leave was improperly denied when SuperValu failed to recognize that his bronchitis constituted a serious health condition. It is especially difficult to understand how the Employer could have let this issue fall through the cracks, given that it designated the September leave as FMLA leave in November, during the very same period that Grievant was experiencing his second bout of bronchitis.

4. Just cause was lacking because the Employer did not investigate.

A proper investigation allows the Employer to discover the underlying reasons for a worker's conduct, provides the worker an opportunity to explain his or her conduct, and gives the Employer the proper perspective from which to decide whether discipline is merited. Here, however, the Employer undertook no investigation. Rather than investigate the reasons for Grievant's occurrences, the Employer blindly imposed discipline when it learned Grievant had accrued a predetermined number of points. Imposition of the no-fault attendance policy in this manner, without investigation or any kind, violates the principle of just cause.

5. The severe penalty of discharge was not justified.

Even if the Arbitrator finds that the Grievant committed misconduct, the discipline imposed by the Employer may not stand because it was not an appropriate penalty, particularly given the circumstances surrounding eight of the Grievant's incurred points. If the Arbitrator finds that Grievant was guilty of violating the Employer's attendance policy, the Arbitrator should

nonetheless modify the penalty, converting the Grievant's termination to a warning, or, at worst, a suspension. In this case, the Grievant is accused of accumulating too many points under the Employer's attendance policy. It is undisputed that Grievant was absent on occasion, and tardy twice. But the majority of the Grievant's incurred points result from events outside of the Grievant's control, including being improperly denied FMLA leave to which he was entitled. Under these circumstances, just cause dictates that if the Arbitrator finds reason for discipline of some sort, the penalty be modified from discharge to a warning, or at worst, a suspension.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. PRIOR UNGRIEVED DISCIPLINE CANNOT BE DIRECTLY OR INDIRECTLY CHALLENGED IN A SUBSEQUENT DISCHARGE CASE.

As a preliminary matter, the Union's FMLA claim is an untimely end-run around the parties' grievance procedure. The Grievant's absences on November 6 and 23-28, 2005 resulted in the imposition of a Consultation, Verbal Warning, and Written Warning. The Grievant and the Union were aware that those absences were being counted as unexcused and failed to grieve. When an attendance policy is in place and an employee is receiving progressive discipline for unexcused absences under the policy, the employee must grieve that discipline in a timely manner. The Grievant was familiar with the grievance procedure and understood his right to grieve discipline in a timely manner. Inasmuch as the Consultation, Verbal Warning and Written Warning were not grieved, these actions must be

deemed to have been properly taken and the books on the November occurrences considered to have been closed long ago.

2. THE COMPANY MAINTAINS AND ENFORCES ITS FMLA POLICY IN ACCORDANCE WITH FEDERAL LAW.

The policy describes for employees, in detail, their right to request FMLA leave, the procedure that must be followed, and the notice and eligibility requirements that must be met in order to have absences excused. The FMLA policy is posted at the distribution center, widely known, and frequently used by employees.

3. THE GRIEVANT WAS AWARE OF AND UNDERSTOOD THE FAMILY AND MEDICAL LEAVE POLICY.

The Grievant admitted that he was aware of and understood the policy and was familiar with the procedures he needed to follow in order to obtain FMLA leave.

4. THE BURDEN OF PROVING A VIOLATION OF THE FMLA IS ON THE GRIEVANT.

The FMLA allows eligible employees up to twelve weeks of leave for "a serious health condition that makes the employee unable to perform the functions" of his job. The courts and arbitrators uniformly hold that an employee has the burden of proving an alleged violation of his or her rights under the FMLA. As it relates to this case, the Grievant had the burden of proving that he complied with and was eligible for leave under the FMLA. That is, the Grievant had to show that he: (1) suffered from a "serious health condition" within the meaning of the FMLA at the time of his absence from work; and (2) gave the Company "timely and adequate" notice of his need for leave. Since the Grievant completely failed to carry his burden of proof on this point, his November absences were properly counted as unexcused under the attendance policy.

5. THE GRIEVANT DID NOT HAVE A SERIOUS HEALTH CONDITION WITHIN THE MEANING OF THE FMLA.

In order to establish a "serious health condition" under the FMLA, an employee must have a medical condition that involves: (1) inpatient care in a hospital (i.e., an overnight stay); or (2) continuing treatment by a health care provider. "Continuing treatment" requires incapacity of more than three (3) consecutive calendar days and either: (1) treatment two or more times by a health care provider; or (2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(a) The Grievant failed to show that he was incapacitated for more than three consecutive calendar days due to a medical condition.

It is true that the Grievant missed more than three (3) consecutive calendar days of work between November 23-28, 2005. However, the Grievant did not prove that his failure to work during this time period was due to a medical condition that incapacitated him from doing so. The Grievant's burden of proof under the FMLA is not met by his or his girlfriend's self-serving testimony that he was "very weak, very tired" or self-medical diagnosis that his "throat" and "upper respiratory" problems were similar to or connected with what he allegedly had in September, 2005. FMLA eligibility must be established at an arbitration hearing by competent medical evidence. The Grievant had the burden to establish the objective existence of a serious health condition. The Grievant should have called his doctor as a live witness to offer an opinion on his incapacity claim. At a minimum, the Grievant should have obtained and produced a letter from his doctor or any other "health care provider" offering a competent medical opinion on the issue. Instead, the

Grievant called his girlfriend who merely testified that she believed the Grievant was too sick to work on the dates in question. The Grievant's failure to produce competent medical evidence that he was absent for more than three (3) consecutive calendar days due to a medical condition that incapacitated him from working is fatal to his FMLA claim.

(b) The Grievant failed to show that he had a medical condition that involved treatment two or more times by a healthcare provider or resulted in a regimen of continuing treatment.

The medical records the Grievant provided in support of his September, 2005 FMLA claim – the only medical records in evidence- show that the prescribed treatment for the Grievant's upper-respiratory symptoms (e.g., sore throat and fatigue) was that he take an antibiotic, drink fluids, rest, and return for a follow-up visit on September 26. On September 26, 2005, the Grievant's doctor cleared him to return to work without restrictions. There is absolutely no evidence to suggest an on-going medical condition for which the doctor was providing treatment or a regimen of treatment under his supervision. Further, the Grievant admitted that he: (1) was released to work without any restrictions on September 26, 2005; (2) worked continuously thereafter; and (3) never returned to see his doctor. These admissions make it impossible for the Grievant to make the required showing that the medical condition he allegedly had in November, 2005 was a continuation of his September medical condition, let alone that he continued to be under a regimen of continuing treatment that was supervised by his doctor through the November absences.

(c) The Grievant failed to show that he was being treated for a chronic serious health condition.

The federal regulations to the FMLA define a "chronic serious health condition" as one which requires periodic visits for treatment by a health care provider, continues over an

extended period of time, and may cause episodic rather than a continuing period of incapacity. The Grievant, by contrast: (1) was given a clean bill of health by his doctor on September 26, 2005; and (2) ceased taking medication and worked continuously for the next two (2)-months. Since the Grievant failed to produce any credible evidence that his November absences were due to a "serious health condition" within the meaning of the FMLA, those absences were properly counted as unexcused under the attendance policy.

6. THE GRIEVANT DID NOT PROVIDE TIMELY AND ADEQUATE NOTICE OF HIS NEED FOR FMLA LEAVE.

A claim under the FMLA cannot succeed unless the employee can also show that he gave his employer "timely" and "adequate" notice of his need for leave. For unforeseeable leave, an employee must notify his employer "as soon as practicable" which means as soon as possible under the facts and circumstances of the particular case. Generally, this means no more than two (2) days after the employee learns of the need for the leave. While an employee's notice does not need to mention the FMLA, it must give the employer sufficient information to make the employer aware that the employee may need FMLA.

The courts and arbitrators have interpreted this "adequacy" requirement to mean that an employee has an affirmative duty to indicate both the need and the reason for leave. That is, the employee must first provide sufficient information to suggest that his health condition could be a "serious health condition." Then, and only then, is an employer required to inquire into the matter further in order to determine whether FMLA leave is indeed applicable. The Grievant's failure to comply with the FMLA's "timely and adequate" notice requirements continued and was compounded after his return to work on or about November 29, 2005. On December 2, 2005, the Grievant met with Diane Bauer (and his steward, Mr.

Erickson) to receive his first step of discipline. The Grievant saw that his absences on November 6, 23 and 25 were being counted as unexcused and did not claim a medical excuse for his absences on those dates, did not advise the Company that he was going to request FMLA leave, did not file a grievance challenging the discipline, understood from the meeting that he needed to improve his attendance to avoid further discipline, and stated he had no present issues affecting his ability to be at work On December 19, 2005, the Grievant met with Bill Moore to receive his second step of discipline. The Grievant saw that his absences on November 6, 23, 25, 26, 27, 28 and December 4, were being counted as unexcused and, again, did nothing. The Grievant did not request FMLA, give a specific reason (medical or otherwise) for his absences, or provide any other information that put the Company on notice that his absence may have been due to a "serious health condition." The Grievant did not file a grievance challenging the Company's reliance on those absences either. The same response occurred at the meeting on December 27, 2005. The above facts make it clear that the Grievant did not give the Company "timely" notice of his need for leave. Efforts to provide notice several days or weeks after returning from an absence are not considered timely.

The fact that the Grievant was granted FMLA in the past, ostensibly for the same illness, did not require the Company to presume that or inquire whether subsequent absences were related. The court rejected a similar argument in *Bailey v. Amsted Industries Inc.*, 172 F.3d 1041 (8th Cir. 1999). The Union's position ignores the fact that the legal obligation to provide timely and adequate notice of the need for leave and to follow Company policy for obtaining leave rested with the Grievant. The Company has 1,200 employees. If the

Company is required to conduct an FMLA investigation every time an employee claims to be "sick", the administrative burden will be so crushing that legitimate FMLA requests will never get processed. This is the very reason courts have held that even when an employee is suffering from a chronic serious health condition and/or has used FMLA leave in the past, simply stating that he or she is "out sick" is not adequate notice of the need for FMLA leave.

7. THE GRIEVANT MADE A CONSCIOUS DECISION NOT TO MAKE AND PURSUE A REQUEST FOR FMLA LEAVE.

The Grievant understood that if he wanted additional leave to cover his November absences, even if it was for the same type of illness he had in September, he needed to make a request and follow the procedures he followed in the past. The Grievant understood that this process would include a requirement that he obtain additional medical records establishing that he was suffering from and being treated for a "serious health condition" on the dates in question – something he admits he never did.

The Grievant waited until January 3, 2006 – more than a month after he returned to work and only after receiving three-steps of discipline - to tell Bill Moore that he "had some medical issues and did not get FMLA for the 5 days." Given the Grievant's knowledge of how to properly use the FMLA policy and the numerous opportunities he had to do so before the Final Warning was issued, as well as his representations up to that point that his absences were for "personal illnesses", one can only assume that the Grievant's motive in finally raising the issue was to try and escape legitimate discipline.

Moreover, even assuming for argument sake that the Grievant's January 3rd statement could be considered a timely request, Bill Moore took appropriate steps to determine if the Grievant had a "serious health condition" by asking if he had a doctor's excuse for the days

in question. When the Grievant answered "no", Moore told him that, "without a doctor's excuse [he] could not get FMLA for this period of 5 days that [he] was gone." When asked why he did not go back to the doctor to get an excuse, the Grievant answered, "I never really considered it. I didn't think that it was going to have any effect on the fact I had missed those five days and had not gotten in and been seen by a doctor for it". In other words, the Grievant made a conscious decision not to request FMLA or provide the Company with information necessary to determine whether he qualified for FMLA.

8. THE GRIEVANT'S "CHRISTMAS EVE" CLAIM

Under the attendance policy, with proper advance notice and subsequent proof, an absence due to a "subpoena for jury duty/court required appearance" is excused. The Grievant claims that his absence on December 24, 2005 should have been excused because of his court appearance in Fargo on December 23, 2005. There are two problems with this claim. First, the Grievant failed to grieve the Written Warning he received that included his absence on December 24th. Second, the Grievant's absence on December 24th did not qualify as an excused absence under the attendance policy. The subpoena the Grievant received was for December 23. The Grievant's deposition ended in time for him to make it back to Minneapolis for his shift on December 24. The Grievant admitted that he simply decided that it was not reasonable to ask his parents to drive him back to Minneapolis that day. The Grievant claimed that he should have been excused because he could not get back from Fargo - his driver's license had been revoked. However, lack of transportation is not among the twelve (12) recognized excuses under the Company's attendance policy. At best, this is the equivalent of a "car trouble" case and the decisions of arbitrators on this subject

are consistent-- the general rule is that car trouble does not constitute an adequate justification for an absence. The Grievant got to Fargo just fine. It was his responsibility to make sure that he could get back to work on December 24. The Grievant admitted that his transportation problem was not the Company's fault and not an excuse for his absenteeism. The Grievant also admitted that he made no effort to determine whether other forms of transportation (e.g., train, bus, plane) were available to him.

9. THE GRIEVANT'S "PERSONAL DAY" CLAIM

The Grievant missed work on April 3 and 4, 2006; had his normal days off on April 5 and 6 returned to work on April 7; and was absent again on Saturday, April 8 due to a cold. The Grievant's absence on Monday, April 3 was counted as an unexcused absence because he did not provide at least 24 hours advance notice of his request to have that day off. The Grievant's absence on Saturday, April 8 was counted as unexcused because a "cold" is not among the recognized excuses under the attendance policy. At his termination meeting, the Grievant claimed that his absence on April 3 should have been excused because he had requested and was allegedly entitled to a "split-day vacation".

The Grievant could not recall whether the message he left for Bill Moore requested a "split-day vacation" or "personal holiday". The notes Moore recorded during the Grievant's termination meeting indicate that the Grievant had requested the former. Section 7.15 of the parties' agreement expressly provides that "a minimum of 24-hours advance notice" must be given in order to take a split-day vacation.

The result does not change even if one gives the Grievant the benefit of the doubt and assumes that he requested a "personal holiday" instead. Sections 8.02 and 8.05 of the

parties' agreement provide for 2 "personal holidays" – i.e., "the employee's birthday and his anniversary date of employment." Section 8.05 makes it clear that "personal holidays" can only be used on those dates "unless it is on a non-scheduled work day, in which case they will receive the closest work day off to celebrate this holiday." This limitation is the likely reason the Grievant requested "split-day vacation" instead of "personal holidays" for his absences on April 3 and 4. Neither was his "birthday" or "anniversary date of employment."

DISCUSSION

The Arbitrator has carefully considered the arguments of the parties, has reviewed the Transcript of the hearing, and has studied the cases and precedents cited by both the Employer and the Union. It is clear to the Arbitrator that the Employer in this case did not violate the rights accorded the Grievant under the FMLA.

The Union has argued that the Company "blindly" imposed discipline without adequate investigation of the facts but this argument is simply not supported by the record. There has been no showing that there were relevant facts unknown to the Employer that might have affected its decision which would have been uncovered by further investigation. The Grievant had ample opportunity on a number of occasions to follow proper procedures and submit evidence to support his claim. He did not do so. It is also true that the Grievant knew the procedures to substantiate a claim of entitlement to FMLA leave and did not follow them. Far from being prejudicial to the Grievant, the Company gave him every reasonable opportunity to substantiate his claims in a timely manner. The Company even granted him FMLA leave retroactively for his September absences.

The Union has also argued that many of the Grievant's absences were the results of external events that were "out of his control." This argument is equally without merit. While it is true that

he could not know in advance that his grandmother in Fargo would have a stroke, it is also true that how he chose to deal with it in terms of his attendance situation at work was completely within his control. A similar situation pertains in regard to returning from Fargo at Christmas time from the deposition in his brother's wrongful death case. It was not only foreseeable, it was absolutely inevitable, that such a deposition would be lengthy, exhausting, and emotionally draining on the Grievant and his family. It was also Christmas time and natural that the Grievant would want to stay with his family. However, knowing all of this in advance, and understanding the precarious situation pertaining to his attendance at work, he nevertheless made no advance arrangements for his return to Minneapolis from Fargo. The situation he was in was admittedly difficult and evoking of sympathy, but it was his responsibility to be at work the next day. The Employer cannot be expected to take into account the personal situations of all of its hundreds of employees on one of the busiest days of the year. It had adopted a reasonable attendance policy and was attempting to administer it even-handedly. Indeed, if it started to make the kinds of exceptions that the Union is urging in this case, it would certainly lead to claims of disparate treatment in future grievance cases.

After review of the extensive authorities cited by the Employer in support of its FMLA related arguments, summarized in detail above, the Arbitrator has concluded that the Employer is correct both in its characterizations of its duties under that law and the application of those duties to the facts of this case. No purpose would be served by an extensive discussion of those cases. Suffice it to say that this Arbitrator believes that the cases support the arguments pertaining to failure to timely grieve previous offenses, failure to give adequate notice of FMLA claim to the Employer, burden of proof, and duty to investigate. See, *e.g., Owens-Illinois, Inc.,* 119 LA 1041

(Dunn, 2003); Schmittou *v. Wal-Mart Stores, Inc.*, 8 Wage & Hour Cases 2d 1841 (D. Minn. 2003); *Budget Rent-A-Car Systems, Inc.*, 115 LA 1745 (Suardi, 2001).

The Arbitrator agrees with the Union that a "Just Cause" standard is implicit in this Collective Bargaining Agreement. That said, the attendance policy is reasonable on its face and the Union did not attack it as unreasonable. Article 13.01 makes violation of rules which are not in conflict with the CBA grounds for immediate discharge. The Union argues that just cause requires that,

> "A determination as to whether just cause is present calls for an appraisal of the substantiality of the reasons for the action taken and a judgment on whether the discharge penalty is fair and reasonable under all the circumstances and not disproportionate to the offense."

The Arbitrator has conducted just such an appraisal and has determined that the attendance policy was applied reasonably and fairly to the Grievant and the extenuating circumstances presented by the Grievant did not justify a departure from that policy.

Finally, the Union argues that because of the circumstances surrounding the various absences that the severity of the penalty was not justified and the Arbitrator should reduce it to a warning. The Arbitrator disagrees. It is well established that Arbitrators have the inherent discretionary power to reduce penalties for discipline where the record does not support the sever ity of the penalty imposed by management. The Arbitrator does not feel that such is the case here. The Grievant has had numerous verbal and written warnings about his attendance in the past to no avail. There is no indication that one more warning from an Arbitrator would do any good. Furthermore, the Arbitrator feels that in this case the Company was extremely patient with the Grievant, gave him numerous opportunities to correct his attendance problems, and was lenient in its imposition of the attendance policy on him. Despite the sympathetic reasons offered by the Grievant for his absences,

the penalty imposed was appropriate. An Employer must be allowed to administer reasonable attendance rules and apply the FMLA even-handedly to run its business efficiently and treat all of its employees equally. The Employer did not violate the Collective Bargaining Agreement when it terminated the Grievant's employment.

DECISION AND AWARD

For the above stated reasons the grievance is denied.

Respectfully Submitted

Stephen A. Bard, Arbitrator